Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01071-CR

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ANTHONY LEE WHITE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 779,970

O P I N I O N

This appeal arises out of Anthony White's conviction by a jury for aggravated robbery of Beverly Benson's auto at gunpoint. White claimed Benson's boyfriend loaned him the car in exchange for drugs. His only issue on appeal is whether the trial court erred in excluding impeachment evidence. Appellant argues he was unconstitutionally limited in his cross-examination of Benson concerning her motive for testifying falsely about the reason she reported the car stolen. We affirm.

Background

Beverly Benson alleged that on February 15,1998, while she was using a pay phone, appellant Anthony White stole her rented Geo Metro at gunpoint. The evidence showed that rather than report the car stolen immediately, Benson called her live-in boyfriend, Stephen Gaines. The two searched for the car for up to an hour before going to the police.

Appellant countered that Gaines, whom he knew very well, had loaned him the car on February 6th in exchange for crack cocaine. Days later, he tried to return the car to Gaines but couldn't find him, so he left the car with friends. Gaines rebutted that he did not know appellant and denied loaning him the car.

A defense witness testified that he had often borrowed cars from Gaines and that Gaines had loaned him the Geo as well as another car owned by complainant. He also testified the complainant had reported and threatened to report other cars stolen before. Another witness for the defense testified that appellant had given him the car on February 10th or 11th, several days before complainant testified it had been stolen.

Complainant had been the first witness called at trial. Appellant attempted to develop evidence which he contends "would have shown that recently the complainant had reported other cars stolen which she knew her live-in boyfriend had loaned to drug dealers in exchange for drugs." During cross-examination, complainant admitted she had recently reported other vehicles stolen or lost. Defense counsel then asked, "Could you please tell the ladies and gentlemen what happened?" The State objected to relevance, which the court sustained after a lengthy bench conference.

Appellant argues the court erred in not allowing him to develop this testimony. He further argues the error implicated his Sixth Amendment right of confrontation.

Discussion

On appellate review the trial court's rulings admitting or excluding evidence are subject to an abuse of discretion standard. *Rachal v. State,* 917 S.W.2d 799, 816 (Tex. Crim. App.1996). If the trial court's decision was within the bounds of reasonable disagreement we will not disturb its ruling. *Id.*

In support of his claim the court erred, appellant relies solely on *Shelby v. State*, 819 S.W.2d 544 (Tex. Crim. App. 1991). In *Shelby*, the trial court refused to allow the defense to cross-examine the complainant's mother (who was the State's outcry witness in that sexual assault case) about a pending lawsuit she had against the owners of the apartment complex where the assault occurred. The court of criminal appeals held that the trial court erroneously excluded the mother's testimony about her lawsuit because it was "apparent from the face of the record that the appellant wanted to question [the complainant's mother] about a lawsuit she brought two months after she reported the offense to the police against the appellant and corporate owners of the property." *Id.* at 545. It added, "It defies reason and logic to argue that the court did not understand the purpose or scope of the inquiry." *Id.* The court further held that the refusal to allow the questioning violated the defendant's Sixth Amendment rights. Appellant argues the *Shelby* analysis is applicable to this case and requires we reverse his conviction.

The State responds that appellant made no contention in the trial court that his Sixth Amendment right of confrontation had been denied. Therefore, it argues that the appellant having failed to "object" at trial on these grounds presents nothing for review under TEX. R. APP. P. 33.1(a).

We agree that the constitutional argument was not preserved. A party offering evidence need show its admissibility. As the court of criminal appeals has stated, "One of the most basic principles extant in the law of evidence is that the burden is on the tendering party

to establish the prima facie admissibility of the evidence offered." *Davis v. State*, 645 S.W.2d 288, 291 (Tex. Crim. App. 1983)

A more recent case applying the reasoning of *Davis* bears notable similarities to our case. In *Johnson v. State*, 963 S.W.2d 140 (Tex. App.–Texarkana 1998, pet. ref'd), the defendant sought to question a witness about extraneous acts by the complainant. The State successfully objected under TEX. R. EVID. 403 and the defendant did not offer a basis for admissibility. On appeal, the defendant argued his Sixth Amendment rights had been violated. Noting that the constitutional basis for admissibility was never raised in the trial court or brought to the court's attention, the court of appeals concluded that the constitutional ground was not preserved for appellate review. *Id.* at 142.

Therefore, we conclude in light of these authorities, because appellant did not raise his Sixth Amendment argument in the trial court, it has not been preserved for review here.[1]

Even if the Sixth Amendment argument had been preserved, we find *Shelby* distinguishable. In that case, the defendant made an offer of proof in which the complainant's mother gave testimony she filed a lawsuit against the landlord where the assault occurred shortly after she filed the police report. The complainant's mother's bias was readily obvious from the questions asked her.

In our case, appellant questioned complainant regarding vehicles she had reported as lost or stolen, "Could you please tell the ladies and gentlemen what happened?" The State objected to relevance and the ensuing bench conference, in pertinent part, went as follows:

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[1] We note that in *Shelby*, the court of criminal appeals addressed the defendant's Sixth Amendment right to confrontation even though it does not appear from its opinion that the argument had been raised in the trial court. Though there may have been any number of reasons for this, we will not speculate on why the court addressed the argument. However, it is clear from precedent directly addressing this issue, it is generally impermissible to consider any grounds that could have called to the attention of the trial court at a time when such error could have been avoided or corrected by the trial court. *Davis*, 645 S.W.2d at 291; *Johnson*, 963 S.W.2d at 142.

Defense Counsel:	This is very relevant to motive as to why her car was stolen. Basically, this lady has reported other cars stolen before because she knows Stephen Gaines had loaned them out to dope dealers . . . . I am not going to specific acts of conduct, I am just asking her about the car that was damaged . . .
The Court:	That's not what you asked her. You asked her had she reported any other cars stolen. You asked her how many, and you asked her to explain it. I think we are way off the case . . .
Defense Counsel:	It's going to be very relevant. We are going to have a witness to testify that he has gotten her car before, the car that she's owned.
The Court:	What does it have to do with this car?
Defense Counsel:	It doesn't have anything to do until it's shown it's relevant . . .
The Court:	Okay, at this point, I am not going to let you go into that. If you establish something later on in the case – but I think the only thing you can do if you're trying to attack her credibility, if she doesn't have a prior conviction, is to bring people to testify about her reputation as to truth and veracity . . . .
Defense Counsel:	I am not talking about – I am talking about ownership and prior incidents. . . . I think it's going to be very, very relevant.
The Court:	At this point, I'm going to agree with the State. I don't think it's relevant. Let's go on to a different line of questioning.

In this colloquy, appellant presented the court with a confusing argument in attempting to establish what evidence he was offering and how it was relevant. Here, unlike in *Shelby*, the purported bias of the complainant was not evident from appellant's global and amorphous question, "what happened?," nor from his statement to the bench about Gaines.

More specifically, it does not appear a sufficient context or foundation had been provided pertaining to complainant's motive for reporting the cars stolen. Complainant was the first person to testify at trial. Appellant points to no place in the record establishing the court was made aware of complainant's relationship to Gaines, that he had access to other cars that she may have reported stolen, or that he loaned them to drug dealers. Until such connections were established in some permissible manner, we can not say the court abused its discretion in refusing to admit the testimony.

The court also apprized appellant that it did not believe his question comported with the testimony he appeared to be seeking. It attempted, more than once, to ascertain from appellant how the testimony was relevant. In response, appellant essentially admitted that it was not relevant *at that time* by repeatedly stating that it was "going to be" relevant, presumably when he later called a defense witness. Because the trial court was not presented with the then present relevance of the questioning, we hold it did not abuse its discretion in sustaining the relevance objection.[2]

In any event, appellant had an absolute right to make an adequate offer of proof to provide a context and clarify the evidence he sought to have admitted, but failed to do so. He therefore failed to preserve any error that might have occurred in excluding the testimony.[3]

Appellant's point of error is overruled. The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed January 13, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[2] The court left the door open to appellant revisiting the issue if he established something later in the case, however, he never attempted to recall complainant.

[3] We note that the court should have allowed appellant to further develop evidence of motive if he wished to do so rather than telling him to go to a different line of questioning. It remained appellant's responsibility to have respectfully insisted that the court honor his right to make an adequate record for appeal.